E.V. MOHAMED ISMAIL

v.

LIM SOK CHENG

HIGH COURT MALAYA, ALOR SETAR
LIM BENG CHOON J
[CIVIL APPEAL NO. 25 OF 1984]
11 NOVEMBER 1987

LANDLORD AND TENANT: *Controlled Premises - Tenancy agreement not in writing - Whether Court can elucidate from total evidence to consider if terms expressed or implied governing tenancy - Condition prohibiting appellant/tenant from subletting premises contained in back of receipt - Appellant not aware of condition against subletting - Whether conditions appearing in back of receipt constituted terms of tenancy - Premises under Control of Rent Act 1966 - Whether respondent can invoke s. 16(1)(b) and (j) of Act - Issue of mesne profits.*

CIVIL PROCEDURE: *Pleadings - Statutory rule governing pleadings - Whether party bound by his pleadings - Exceptional reasons to depart from rule - Whether Magistrate right to allow appellant to import evidence which is inconsistent with averments in pleadings.*

This was an appeal from the decision of the Magistrate's Court, Alor Setar whereby the learned Magistrate had directed that vacant possession of a shophouse be delivered to the respondent and also that the appellant was to pay *mesne* profits at double the monthly rent to the respondent as from 1 September 1975 until the delivery of vacant possession of the premises. In 1940, the respondent had rented out the premises to the appellant at a monthly rental of RM10. This was increased to RM15 in 1955 and in 1967 the monthly rental went up to RM20. Upon the payment of the monthly rental, the appellant would receive a receipt which, *inter alia*, prohibits the tenant (the appellant) to sublet the premises. On 2 March 1975 the appellant subleased the premises to a third party. Thereupon the respondent, through her solicitors sent to the appellant a notice to quit. The respondent also claimed vacant possession of the premises. On realising that the appellant did not receive the said notice, the respondent instructed her solicitors to send another notice to the appellant. The appellant denied having sublet the premises to anyone.

The substantial questions before the Court were:

1. Was there a tenancy agreement between the two parties?
2. Was there a condition prohibiting the appellant from subletting the premises?
3. Was the appellant in breach of the condition which enabled the respondent to invoke s. 16(1)(b) and (j) of the Control of Rent Act 1966?
4. Did the Magistrate consider para. (b) and (m) of s. 16(1) of the Control of Rent Act 1966?

Held:

[1] There was a tenancy agreement since the appellant had admitted in his statement of defence that he was a monthly tenant of the respondent in respect of the said premises at a monthly rental of RM20.

[2] The words printed at the back of the receipt are clear enough to constitute the terms of the tenancy including the condition prohibiting any subletting of the premises without the owner's consent. The Court cannot default the learned Magistrate's finding of fact that the respondent did issue a receipt for every monthly rental paid by the appellant and that the condition prohibiting subletting was and still was a condition of the tenancy.

[3] The appellant, having failed to reject or at least to protest the prohibitive condition, cannot be allowed to controvert the imposition of the said condition at this later stage. By his conduct, he had evinced acceptance of the prohibition condition and he had therefore waived any right to controvert the said condition.

[4] The appellant cannot now adduce evidence that he did not sublet the premises to PW2 when by para. 2 of his statement of defence he has clearly admitted that he had entered into an agreement to sublet the said premises to PW2. Bearing in mind the salutary rule governing pleadings which demands that a party is bound by his pleadings unless there are exceptional reasons to justify a departure from this rule, the learned Magistrate should have disallowed the appellant to import evidence into the case which is completely inconsistent with the averments in his pleadings.

[5] The Court found no reason to disagree with the learned Magistrate's order in directing that vacant possession should be delivered to the respondent since the respondent has made out a case for possession under s. 16(1)(b) and (j) of the Control of Rent Act.

[6] In the circumstances of the case, it was not unreasonable for the Court to order the delivery of vacant possession of the premises to the respondent since it was due to the deliberate misconduct of the appellant which led to the removal of the fetters on the respondent's right to recover possession of the premises.

[Appeal dismissed with costs.]

Cases referred to:
Chow Yee Wah & Anor. v. Choo Ah Pat [1978] 2 MLJ 41
Goh Gok Hoong v. Abdul Hamid & Anor. [1967] 1 MLJ 366
Malaysian Airlines System Bhd. v. Malini Nathan & Anor. [1985] CLJ (Rep) 569
Natesan v. Goh Gok Hoon [1968] 2 MLJ 3
Combe v Combe [1951] 1 All ER 767
United Fire & General Insurance Co. Ltd. v. Jaffnese Co-operative Society Ltd. [1971] 1 MLJ 118
Soong Ah Chow & Anor. v. Lai Kok Cheng [1986] 1 MLJ 43
Wong Miew Chong v. Loh Fatt [1961] MLJ 219
SEAC Co. v. Ang Ah Bak [1967] 1 MLJ 170
Yeong Peng Wah v. Bahal Singh [1961] MLJ 316

Legislation referred to:
Control of Rent Act [Sing], s. 15(1)(g)
Control of Rent Act 1966, s. 16(1)(a) - (m)
Control of Rent Ordinance 1956, s. 12(1)
Evidence Act 1950, s. 92

For the appellant - Panjaram; M/s. Mayandi & Panjaram
For the respondent - Francis Nathar; M/s. Francis Nathar & Co.

JUDGMENT

Lim Beng Choon J:

This is an appeal from the decision of the Magistrate's Court Alor Star whereby the learned Magistrate of that Court has directed that vacant possession of the premises known as No. 5C, Jalan Putra, Alor Star ("The premises") be delivered to the respondent and also that the appellant was to pay to the respondent *mesne* profits at double the monthly rental of the premises as from 1 September 1975, until the delivery of vacant possession of the premises to the respondent.

The brief facts of the case are as follows. The respondents, the registered owner of the premises, rented out the premises to the appellant in 1940. The monthly rental was in the sum of RM10. Subsequently in 1955 it was increased to RM15 and again in 1967 the monthly rental went up to RM20. I should pause for a moment to mention that the learned Magistrate is clearly wrong when he said in his judgment that in 1967 the monthly rental was increased to RM30 (See p. 96 of the Record of Appeal). Apart from the statement of claim of the respondent where it was averred in para. 2 thereof that the monthly rental was RM20 at the time when the suit was instituted (see p. 2 of the Record of Appeal), there was hardly any dispute from the evidence as adduced at the trial that the increase of the rental in 1967 was no more than RM20 per month (see pp. 68 to 75 and also pp. 90 to 91 of the Record of Appeal). Be that as it may, this error is of no significance in my determination of the appeal except that it will necessitate the calculation of the *mesne* profits to the respondent based on a monthly rental of RM20 and not RM30 should I dismiss the appeal.

Reverting to the facts, it is to be noted that upon payment of the monthly rental by the appellant, the respondent would issue a receipt which had the following words printed at the reverse side of the receipt:

> The persons who owns the receipt is not entitled to sublet the house either wholly or partly without the written consent of the Landlord and in default they will be removed from the premises. Those who desire to quit the house must give a month's notice to the landlord before leaving the same. If the landlord required the said house for his own occupation, the tenant must quit the house and remove his furnitures on a month's notice. The tenant must pay water rate, night soil, sewaging and assessment.

When the respondent proposed to increase the monthly rental from RM10 to RM15, the appellant apparently raised no objection. However the appellant objected to the respondent's proposal to increase the monthly rental from RM15 to RM20 in January 1967 and he wrote a letter to the respondent on 31 January 1967 to register his objection on the sole ground that the monthly rental RM15 was fair and he would not agree to the increase (See p. 81 of the Record of Appeal). It is quite clear from the evidence that he did not seriously make an issue about the increment of the monthly rental of RM20 and he had acquiesced to pay the new rent and did continue to pay the new rent in spite of his letter of 31 January 1967 (See p. 81 of the Appeal Record). Things went on smoothly until May 1975 when the respondent realised that the appellant had on 2 March 1975 subleased the premises to a third party namely one A. Mohd. Shariff bin Abdul Rahman, PW2. Thereupon the respondent instructed her solicitors to give notice to quit which they did on 10 May 1975 ("the first notice") to the appellant on the ground that he was in breach of a condition of the tenancy which prohibited him from subletting the premises to anyone without the consent of the respondent. In addition the respondent also alleged that since the appellant was receiving rental from the sub-tenant at the rate of RM4 per day the respondent was entitled under s. 16(1)(j) of the Control of Rent Act 1966 to recover possession of the premises. In the result, the appellant was required

to deliver vacant possession of the premises to the plaintiff on or before 30 June 1975. However, as there was no response from the appellant, the respondent went to see him about the matter whereupon the appellant informed her that he had not at any time received the first notice to quit. The respondent, therefore, instructed her solicitors to serve him another notice to quit based on the same grounds as stated in the first notice to quit which they accordingly did so on 7 July 1975 ("the second notice to quit") and the appellant was also informed that he was given until 31 August 1975 to move out and to deliver vacant possession of the premises to the respondent on 1 September 1975. The appellant did receive the second notice to quit on 12 July 1975 as admitted by him (see p. 53 of the Record of Appeal) and he instructed his solicitors to reply to the solicitors of the respondent contending that he had been and still was residing and carrying on business at that premises. In short what he said was that he did not sublet the premises to anyone. In his reply to the plaintiff's demand for vacant possession of the premises he also brought out some old complaints of his particularly about the failure on the part of the plaintiff to carry out works in connection with the supply of fresh water to the premises which he alleged was a condition which led the parties to agree to the increase of rental from RM15 to RM20 in 1967.

Although the Memorandum of Appeal contained 8 grounds on which the appeal is based, to my mind the more substantial questions which this Court is asked to answer are as follows:

(1) Was there a tenancy agreement made between the parties concerned whereby the appellant was let into possession of the premises?

(2) Was there a condition in the tenancy agreement prohibiting the appellant from subletting the premises?

(3) Was the appellant in breach of the said condition thereby enabling the respondent to invoke s. 16(1)(b) and (j) of the Control of Rent Act 1966 to recover possession of the said premises?

(4) At any rate did the learned Magistrate fail to take into consideration the provisions of para. (b) and (m) of s. 16(1) of the Control of Rent Act 1966 in arriving at his decision?

As regards to the first issue the short answer is that the appellant admitted in his statement of defence that he was a monthly tenant of the plaintiff in respect of the premises and he paid the rental of RM20/- monthly. As the parties are bound by the pleadings I cannot see how the question of whether there was a tenancy agreement or not could have arisen. However that may be I think what the learned Counsel for the appellant meant was that as there was no written agreement setting out the terms of the tenancy it was implicit that the only term of the tenancy was that so long as the appellant paid the agreed monthly rental he could stay as long as he liked.

It is quite true that the terms of the tenancy agreement were not reduced in writing. However, that by itself could not preclude the learned Magistrate from elucidating from the total evidence to find out whether there were in fact any terms expressed or implied governing the tenancy at its commencement. His finding on this matter is to mind a finding of fact and unless he had misdirected himself in law in arriving at his finding or that his finding is so perverse that it could not be sustained, this Court in exercising its appellate jurisdiction should be slow to interfere with his finding - see *Chow Yee Wah & Anor. v. Choo Ah Pat* [1978] 2 MLJ 41. Be that as it may, after a careful scrutiny of the learned Magistrate's finding in this respect, I am fully satisfied that he had not misdirected himself in law in arriving at his finding. I say so for the following reasons. Firstly, the plaintiff herself had led evidence to show that whenever she received the monthly rental from the appellant she had issued a receipt. She

had in fact produced copies of the receipts which she had issued at various dates since 1950 until 1975. At the back of these receipts there were the same conditions, as adumbrated above printed thereon which, *inter alia*, expressly prohibited the appellant from subletting the premises to a third party (See Grounds of Judgment of the learned Magistrate at p. 97 of the Appeal Record). There was also evidence to show that the appellant himself was fully aware of this condition as he had said in his testimony that

> When the rent was raised to RM20 the plaintiff also agreed to let (allow) me to let someone to occupy the premises. (see p. 47 of the Record of Appeal)

He later reiterated that he agreed to the rental of RM20 provided that he was allowed, *inter alia*, to sublet the premises to a third party (See p. 59 of the Record of Appeal). The tenacious assertions of the appellant clearly indicate that he had negotiated with the plaintiff to allow him to sublet when the plaintiff proposed to increase the rental from RM15 to RM20. It is also clear from the evidence that the plaintiff did not agree to allow him to sublet the premises as she continued to issue the monthly receipts with the same conditions printed at the back of each receipt and was accepted by the appellant. In the circumstances, I cannot default the learned Magistrate's finding of fact that the plaintiff did issue a receipt for every monthly rental paid by the appellant, and that the condition prohibiting subletting was and still is a condition of the tenancy, particularly when his finding was based on the advantage of his seeing and hearing the witnesses.

In his argument before me, the learned Counsel for the appellant contended, firstly, that those printed words at the back of the receipts could not in law be construed as a condition of the tenancy and, secondly, that at any rate the appellant could not be expected to be aware of such condition as he could not read or write either English or Chinese. In answer to the first limb of the learned Counsel's submission, I would refer to the judgment of Ismail Khan J in the case of *Goh Gok Hoong v. Abdul Hamid & Anor*. [1967] 1 MLJ 366 where it was held that an inscription appearing on a receipt issued in acknowledgement of the payment of a monthly rental could constitute a condition of the tenancy. Again in a more recent case of *Malaysian Airlines System Bhd. v. Malini Nathan & Anor*. [1985] CLJ (Rep) 569 it was held that the appellant's obligation to carry a passenger was subject to the conditions printed in the ticket issued to the respondent. It is true that in the *MAS* case the particular condition relied by MAS to absolve them from liability was inserted under the heading of "Conditions of Contract" printed at p. 2 of the ticket and in the present appeal such word or words to the effect did not appear in the receipt. Notwithstanding the omission of the words "condition of contract" in the receipts, the words printed at the back of the receipts are certainly clear enough to constitute the terms of tenancy including the condition prohibiting any subletting of the premises without the owner's consent.

As to the second limb of the learned Counsel's argument, I am not convinced that the appellant was not aware of the condition against subletting in view of what I have said earlier. Indeed if the appellant was not aware of the prohibitive condition why was it necessary for him to persist in negotiating with the appellant to allow him to sublet when the respondent broached the subject of an increase of the monthly rental in 1967? Support for this proposition can be found in the following passage of Ismail Khan J in his judgment in the *Goh Gok Hoong* case (*supra*):

> If the tenant was not subject to the obligation expressed plainly on each rent receipt, why was it necessary to persist so strenuously and so long in denying a subletting which the tenant has every right openly to do? The first respondent's own conduct over the years, especially since 1948, could have been consistent only with a landlord-tenant relationship which the tenant knew imported a condition against subletting.

When that case went on appeal to the Federal Court (see *Natesan v. Goh Gok Hoon* [1968] 2 MLJ 3, Azmi CJ (as he then was) in dismissing the appeal said at p. 6:

> In my view, the learned appellate Judge was right in holding the view that the Sessions Court should have considered also the evidence of the tenant; and his admission as to the existence of such a rent receipt would be sufficient to prove its existence. After all this is a civil matter and the Court is entitled to consider also the evidence of the defendant. I would go further that I would with respect agree with the learned Judge on his findings and reasons for that finding.

The learned Counsel for the appellant proceeded to contend that as the respondent had failed to produce any receipts for the years prior to 1950, it must be accepted that no such condition against subletting was imposed when the appellant went into occupation of the premises and the respondent could not unilaterally impose such a condition in 1950. With due respect, I cannot accept such a contention since the respondent had persistently said in her evidence that she had issued receipts bearing the same condition at the beginning of the tenancy (see p. 33 of the Record of Appeal). She also said under cross-examination that she did issue "receipt during the Japanese Occupation until now". There is no doubt that the learned Magistrate after hearing and seeing this witness had arrived at his finding of fact that the respondent did issue receipts bearing the prohibitive conditions even prior to 1950 and this Court in exercising its appellate jurisdiction should be slow to intervene - see *Chow Yee Wah & Anor. v. Choo Ah Pat* (*supra*) At any rate it is to be noted that the appellant himself did not refute that the respondent did issue receipts to him bearing the same prohibitive condition prior to 1940. Indeed he agreed that every time he paid his monthly rental, a receipt was issued to him by the respondent (see p. 47 of the Record of Appeal) and when he was cross-examined he merely said that sometimes there was a delay in the issue of the receipts and that although he knew "certain things were written in the back of the receipt", but he did not know what they meant (see p. 54 of the Record of Appeal).

At any rate assuming for the sake of argument that no such prohibitive condition was imposed when the appellant accepted the tenancy of the premises in 1940 and that the said condition was only introduced in 1950, nevertheless the appellant must be held to have accepted the said condition as shown in the evidence adduced at the trial. In the result, the appellant, having failed to reject or at least to protest against the prohibitive condition, cannot be allowed to controvert the imposition of the said condition at this late stage. By his conduct, he had evinced his acceptance of the prohibitive condition imposed some 27 years ago if not earlier and he had therefore waived any right that he might have to controvert the said condition. An instructive proposition regarding the doctrine of waiver can be found in the following words of Lord Denning in *Combe v. Combe* [1951] 1 All ER 767 at p. 707:

> It only prevents a party from insisting on his strict legal rights when it would be unjust to allow him to do so, having regard to the dealings which have taken place between the parties,

and at p. 771 Lord Denning went on to give some illustrations of the circumstances in which a defendant by his conduct could debar him from relying on some conditions, denying some allegations, or taking some other points in answer to the claim against him.

Turning to the issue, I cannot see how the appellant can now say that he did not sublet the premises to PW2, when in para. 2 of his statement of defence he clearly admitted that he had entered into an agreement to sublet the said premises to PW2. Bearing in mind the salutary rule governing pleadings which demands that a party is bound by his pleadings unless there are exceptional reasons to justify a departure from this rule, the learned Magistrate, therefore, should have disallowed the defendant to import evidence into the case

which is completely inconsistent with the averments in his pleadings. In support of my proposition reference may be made to *Natesan v. Goh Gok Hoon* (*supra*) at p. 8 where H.T. Ong FJ said,

> Above everything else is the fact that the learned Counsel for the appellant now sets up a case which not only is not founded upon, but contrary to, this appellant's own pleadings. We should be creating an absurd precedent to consider allowing this appeal, on any ground, without even any application for consequential amendment of the defence pleaded. Any amendment, at this stage, setting up a case which amounts to a *volte-face*, is naturally out of the question.

At any rate the learned Counsel for the appellant had rightly conceded that the appellant did sublet the premises to PW2. However, he contended strongly that notwithstanding the subletting of the premises to PW2, the respondent, nevertheless, was not entitled to invoke s. 16(1)(b) and (j) of the 1966 Act. In developing his submission on this issue the learned Counsel for the appellant drew the attention of this Court to the fact that the actual rents received by the appellant from PW2 were no more than a paltry sum of RM14 despite the fact that the agreement to sublease executed by the appellant and PW2 on 2 March 1975 ("the 1975 Agreement") mentioned a rental of RM4 per day. The reason for the inability on the part of the appellant to collect the full rental, pursuant to the said agreement, was due to the fact that after taking over the business and running it for some 3 days, PW2 desired to terminate the sublease. In the consequence, so said the learned Counsel, it could not be said that the appellant did receive an amount of rental which was more than 10% of the monthly rental of RM20 which the appellant was paying to the plaintiff in respect of the premises. In considering the contentions of the learned Counsel, it is necessary that one should appreciate the nature and scope of the protections afforded to a tenant of a controlled premises under the Control of Rent Act 1966. It is to be noted that the concept of a statutory tenancy as provided in Part V of the Control of Rent Ordinance 1956 had been abolished when the 1956 Ordinance was repealed and replaced by the present 1966 Act. In the result, the tenant of a controlled building can now hold over only by virtue of s. 16(1) of the 1966 Act. This proposition was first propounded by the Federal Court in the case of *United Fire & General Insurance Co. Ltd. v. Jaffnese Co-operative Society Ltd.* [1971] 1 MLJ 119. There the plaintiffs, the owners of the premises in dispute, had given notice to quit to their tenants. After expiry of the notice to quit, the tenant continued to occupy the premises. Subsequently they purported to sublet a portion of the premises to the defendants. In holding that the 1966 Act has no provision to enable a tenant, who was merely holding over to transmit his privilege of irremovability to a third party the Federal Court went on to say at p. 122:

> In the first place there is no longer any such creature as the "statutory tenant" after 1 January 1967. It will be noted that all reference to "statutory tenants" contained in Part V, ss. 20 and 21; of the 1956 Ordinance and in the definition of "tenant" have been deleted from the 1966 Act. There remains only one relic of him from the past namely that under sub-section (3) of s. 17 the subtenant who is irremovable by virtue of the provisions of s. 17 continues to enjoy the same personal, non-transferable privilege of occupation as the provisions of s. 19(2) of the 1956 Ordinance.

In a more recent case of *Soong Ah Chow & Anor. v. Lai Kok Cheng* [1986] 1 MLJ 43, Hashim Yeop Sani FJ explained the nature and scope of the protections afforded to a tenant of controlled premises under the 1966 Act in greater clarity when His Lordship said:

> Thus *United India Fire & General Insurance Co. Ltd. v. Jaffnese Co-operative Society Ltd.* should be read in its proper context. In our view, that case merely emphasises the abolition of "statutory tenancies" by the Control of Rent Act 1966 and that a tenant can now hold over only by virtue of s. 16(1) of the Act.

> In short, the gist of the contention canvassed by the appellants is simply as follows. Even though the Control of Rent Act 1966 has done away with statutory tenancies the Act still protects tenants in the situation of the appellants. In our view, however, the protection under the 1966 Act against eviction of a tenant is contained in the provisions of s. 16 of the Act; and the protection against unfair increase of rentals is contained in s. 4-11 of the Act. The Act confers no other protection to the tenant.

The proposition that can be distilled from these two authorities that is of fundamental relevance to the present appeal is that a tenant of a controlled building can only rely on s. 16(1) of the 1966 Act against eviction. However, if the landlord of such premises can bring a case within any of the provisions set out in para. (a) to (m) of s. 16(1) of the 1966 Act, the landlord has acquired a right to recover possession of the controlled premises, and he need only to clothe his right with judicial countenance in order to enforce his right. Reverting to the present appeal, I must therefore ask myself whether the respondent has a right under s. 16(1)(b) and (j) to eject the appellant. Putting it another way, the question to be asked is whether the appellant had violated the provisions of para. (b) and (j) thereby removing the shackles imposed under the 1966 Act, and enabling the respondent to move this Court for an order of re-possession. In dealing with the question of whether s. 16(1)(b) and (j) could apply in the present appeal, one may recollect that the appellant contended, firstly, that there was no condition in the tenancy to prohibit him from subletting, and, secondly, that he was not in violation of the provision of s. 16(1)(j) in that he only collected a sum of RM14 as rental from PW2 which was well below the sum of RM20 which he paid to the respondent as the monthly rental of the premises. I have dealt at length as regards to the first contention, and it is not necessary for me to repeat what I have said earlier except to say that I fully agree with the learned magistrate's conclusion that there was such a prohibitive condition in the tenancy of the said premises. As to the second contention, it is worthy to note the following instructive proposition propounded by Ong J in the case of *Wong Miew Chong v. Loh Fatt* [1961] MLJ 219 at p. 220:

> The Control of Rent Ordinance therefore operates as a fetter on the exercise of the common law rights of a landlord. Such being the case, any statutory invasion of or interference with private rights ought to be strictly construed. These fetters on a landlord's right to recover possession of premises from a tenant are struck off if he can bring his claim under any of the fourteen grounds specified in s. 12(1). The appellant by his own acts had removed those fetters and the landlord in this case has clearly established his right to repossession under para. (j).

Another authority which is nearer to the point in issue is the case of *SEAC Co. v. Ang Ah Bak* [1967] 1 MLJ 170. In that appeal which arose from an action for recovery of possession of two floors of a premises, the argument before the Federal Court was that as the tenant had stopped receiving a rent in excess of the maximum permitted under the provision, of s. 15(1)(g) of the Singapore Control of Rent Act (Cap 266) (which is substantially similar to s. 16(1)(j) of the Control of Rent Act 1966) before his contractual tenancy was terminated, he was not in breach of the said provision and the landlord was not entitled to possession. Chua J who delivered the judgment of the Court, having reviewed several decisions given by the Courts in Malaya, held that the learned Judge in the High Court was right in holding that "a landlord's right of action for recovery of possession arises **immediately** upon the tenant subletting at a rent in excess of the maximum permitted under para. (g) of s. 15(1)."

Transposing the principles laid down in the two authorities cited above to the present case, I am of the considered opinion that, in the circumstances of this case, the second contention of the appellant is unsustainable for the following reasons. In the first place the appellant was fully aware of the prohibitive condition about subletting any portion of or the whole

premises. Despite his awareness of such a prohibitive condition, yet he not only deliberately entered into the 1975 Agreement with PW2 but led PW2 to believe that he was the "owner" of the premises in dispute. More importantly the advantage which the appellant would enjoy under the 1975 Agreement but for the premature termination of the said Agreement would be a monthly rental of RM120 for a period of 2 years.

From the above discussions I have no doubt at all that the appellant was in breach of the condition of the tenancy to sublet. Equally I have no doubt, pursuant to the principles of law as discussed above, that the respondent had a right to obtain possession of the premises on the date when the 1975 Agreement was executed by the appellant and PW2. The respondent's delay in applying to this Court for an order to enforce his right could not in any way diminish his right.

Even if I were to accept the learned Counsel's contention that the appellant had only received a sum of RM14 from PW2 as rental for the premises (which I cannot accede to as can be seen presently), nevertheless the law cannot shut its eyes to the terms of the 1975 Agreement. Had that Agreement been carried out amicably by the parties concerned, the appellant would without doubt be enriched by something like RM100 per month. At any rate, it is to be noted that when PW2 unilaterally rescinded the 1975 Agreement, he instructed his solicitors to write to the appellant which they did on 30 March 1975, informing him about the rescission and demanding the return of the deposited sum of RM1000 pursuant to cl. 12 of the 1975 Agreement (see p. 78 of the Record of Appeal). Apparently the appellant was not prepared to accept the rescission and the refund of the sum of RM1000. The dispute was then referred to an arbitrator some time in April 1975 and as a result, both parties arrived at a compromise apparently on the advice of the arbitrator whereby the appellant was told to refund a sum of RM500 to PW2. There is no explanation in the Supplementary Agreement (see p. 79 of the Record of Appeal) as to why the appellant was allowed to retain one half of the RM1000. However, PW2, in his evidence, said that the appellant was allowed to retain the remaining RM500 because of the arrears of the rental, which PW2 failed to pay, for the 2½ months in which he was in occupation of the premises, which amounted to RM300, at the rate of RM4 per day (see p. 44 of the Record of Appeal). It is convenient to pause here for a moment to consider whether the oral evidence of PW2 is admissible, in view of the fact that the terms of settlement of the dispute between PW2 and the appellant had been reduced in writing in the form of the said Supplementary Agreement. It is clear that the Supplementary Agreement is not strictly an award of the arbitrator; it merely reflects the compromise reached by the parties to the arbitration. More importantly, however, is that the said Supplementary Agreement is silent as to the reason for allowing the appellant to retain RM500 out of the sum of RM1000, which under cl. 12 of the 1975 Agreement, should be paid in full to PW2. It is therefore my considered opinion that the aforesaid oral evidence of PW2 is admissible under s. 92 of the Evidence Act 1950, not to vary, add to or subtract from the terms set out in the Supplementary Agreement, but to explain on a matter which that document had omitted to give any explanation. In the final analysis, I am in full agreement that the appellant had received RM120 per month from the subletting of the premises to PW2, albeit for 2½ months, and this was done contrary to the prohibitive provision in the tenancy of the premises which he rented from the respondent. As the amount of the rent derived from the subletting is more than six times the monthly rental, which the appellant paid to the respondent, the former had unlocked the fetters on the respondent's right to recover possession.

Another point raised by the learned Counsel in support of his argument regarding the third issue is that the so called monthly rental of RM4 per day included payment towards goodwill, fixtures and fittings of the business premises. In the circumstances, it was not possible for

this Court to apportion how much out of the RM4 per day should be considered as payment towards goodwill, fixtures and fittings, and, how much of that sum was actually payment for the daily rental. To that I cannot agree for the simple reason that cl. 2 of the Agreement clearly said that the daily rental was to be RM4 per day. Furthermore the Agreement also clearly spelled out the value of the goodwill, the fittings and fixtures of the business premises in respect of which PW2 had to deposit with the appellant a sum of RM1000 - see, for example, cl. 1 of the agreement. To concede the learned Counsel's contention would emasculate and render impotent the clear wording of cl. 2.

As to the last issue raised by the appellant, namely that the learned Magistrate should not have made the order of granting vacant possession of the premises to the respondent in view of the provisions of s. 16(1)(m) of the Control of Rent Act 1966 which reads as follows:

> (m) in any case, whether falling within any of the preceding paragraphs or not, where the Court considers it reasonable that such an order or judgment be made or given and is satisfied that suitable alternative accommodation is available for the tenant or will be available for him when the order or judgment takes effect.

I am able to find a sensible proposition on the interpretation of the aforesaid of the aforesaid provisions in the case of *Yeong Peng Wah v. Bahal Singh* [1961] MLJ 316. There, the appeal was against the judgment of the High Court at Ipoh affirming the judgment of the President of the Sessions Court Taiping on his interpretation of para. (n) of s. 12(1) of the Control of Rent Ordinance 1956, which is in *pari materia* with para. (m) of s. 16(1) of the present 1966 Act. In rejecting the contention that even when the landlord in that appeal had succeeded in making out a case for possession under s. 12(1)(j) of the 1956 Ordinance, he could not recover possession unless he must, in addition satisfy the requirements of the said para. (m), Ong J said

> There are thus two alternative constructions of para. (n). Either it is to be construed as enlarging the scope of the exceptions to s. 12(1) or as restricting it. If the former, each of these para. (a) to (n) has independent force and effect; if the latter para. (n) makes all the rest redundant. Good sense provides the solution.

In applying this proposition to the present appeal, I see no reason to disagree with the learned Magistrate's order in directing that vacant possession should be delivered to the respondent since the respondent has made out a case for possession under s. 16(1)(b) and (j) of the 1966 Act. No doubt the learned Magistrate did not make it clear as to whether he had taken into consideration para. (m) of s. 16(1) of the said Act. But in the circumstances of the case, I do not think that it is unreasonable for the Court to order the delivery of vacant possession of the premises to the respondent since it was due to the deliberate misconduct on the part of the appellant which led to the removal of the fetters on the respondent's right to recover possession of the premises. At any rate, the appellant has had ample time to find suitable alternative accommodation from 27 May 1975, when the learned Magistrate delivered his decision, until the date of the delivery of this judgment. More importantly, it can hardly be said that suitable alternative accommodation would not be available had the appellant taken the trouble to look for the one during this long interval of some 9 years.

For the above reasons, this appeal is dismissed, and the appellant shall bear the costs of this appeal and also the costs of the proceedings in the lower Court.

Also found at [1988] 1 CLJ 335